No. 20756

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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Commerce Is Involved.

The court below held that the business or commerce of supplying personnel and equipment for scoring duplicate bridge tournaments wasn't the *type* of commerce contemplated by the Sherman Act. But *U. S. v. du Pont* (Op. Br. p. 14) establishes that the Sherman Act extends to every type of commerce, all consistent with the broad language of the statute. Accordingly, defendants now contend that supplying personnel and equipment for scoring duplicate bridge tournaments isn't commerce at all.

Plaintiff was chartered as a profit-making corporation by the State of California for the specific purpose of providing personnel and equipment for scoring duplicate bridge tournaments. Plaintiff conducted that business in interstate commerce. On the face of it, this

commerce is of the typical variety. If it isn't, plaintiff is surely living a fantasy, having spent in excess of $60,000.00 implementing this business.

If one were to understand the game of bowling only as a Sunday afternoon activity on the green, one might not appreciate that there could be any commerce in automatic pinspotting equipment. But there is. If one were to understand voting only in terms of a town hall meeting, one might not appreciate that there could be any business in supplying machines for tabulating, recording, cumulating votes. But there is. If one were to understand horse racing only in terms of a seventeenth century village sport, one might not appreciate that there could be any commerce in supplying personnel and equipment for tabulating and calculating results of wagering on horse racing. But there is. Similarly, if one were to understand the game of bridge only as an every-other-Wednesday game with Aunt Minnie, one could hardly appreciate that there could be any commerce in supplying personnel and equipment for scoring duplicate bridge tournaments. But there is.

Defendants' argument at page 19 of their brief[1] is no more than an improper attempt to have this court assume facts not in evidence, and determine *without benefit of trial* that duplicate bridge tournaments are in the same class as chess. But defendants carefully omitted boxing, football, etc.

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[1]". . . Certainly the scoring of track meets, tennis matches, swimming meets, chess tournaments, or similar games and sports, could not reasonably be contended to be the type of trade or commerce contemplated by Congress in enacting the Sherman Act. And yet, this is exactly the type of activity involved in the present case."

In the Report of the Attorney General's National Committee To Study the Antitrust Laws, March 31, 1955, there is a section beginning at page 62 entitled "What is 'trade or commerce'?". The following language is pertinent:

> "The words 'trade or commerce' used in Section 1 of the Sherman Act, and 'any part of the trade or commerce' in Section 2, take meaning both from their common law sense and from their part in a broad statutory plan. They have been construed to include all sorts of economic activities, so long as the requisite interstate effect is found. The term 'trade or commerce' is not limited to economic activities involving the production and physical movement of goods. Thus banking, insurance, finance, the business of conducting hospitals and making organized provision for medical care all may come within its scope."

One might not find in the Yellow Pages of the classified directory a heading Chess Tournaments—Direction and Scoring, or Tennis Matches—Direction and Scoring. But there is in the Yellow Pages of the Los Angeles classified directory Bridge—Duplicate Direction and Scoring. In the August 1963 issue of the Los Angeles classified directory there were two listings under this heading:

AMERICAN CONTRACT BRIDGE LEAGUE
11010 Sta Monica WLA BR 2-7991

BRIDGE CORP OF AMERICA
2978 Wilshr DU 3-4223

These listings clearly belie the vacuous contention of defendants that no commerce is involved. Moreover,

these listings evidence a direct competition between the plaintiff Bridge Corporation of America and the defendant American Contract Bridge League.

Bridge Is Big Business.

The defendant ACBL, according to Paragraph V of the Complaint [Tr. p. 135] and Exhibit C [Tr. p. 112], is in the business of directing tournaments; is in the business of hiring employees for compensation for the purposes of carrying out such business; is in the business of directing and scoring duplicate bridge tournaments and of paying fees and expenses to scorers and directors; is in the business of fixing emoluments to be paid to such persons by fixed schedule; is in the business of receiving fees for national tournament directors in an amount in excess of $34,000.00; is in the business of selling supplies for duplicate bridge tournaments with income as of June 30, 1964 in excess of $29,000.00; is in the business of maintaining an inventory for its tournament department in an amount in excess of $50,000.00. Said League is further in the business of advertising its services to the public and represents to the public that its services are available for the direction and scoring of duplicate bridge tournaments. The defendant ACBL has accumulated total assets in excess of $682,000.00; for the period ending June 30, 1964 received income of approximately $557,000.00; maintains banking accounts in diverse states; owns securities having a market value of more than $118,000.00; owns and maintains building and lease holds; is in the business of selling merchandise and service for compensation; is in the business of using media of communication and transportation for the facilitation of its busi-

ness; is in the business of making contracts for materials and services; is in the business of paying expenses of travel and lodging to tournament directors and scorers; etc.

The recently concluded Los Angeles Bridge Week cost between $25,000 and $30,000 just for scoring! This is certainly commerce—namely, the commerce that plaintiff is after and which defendants monopolize.

The Acts Complained of Support Jurisdiction Under the Sherman Act.

The acts complained of include the acquisition of monopoly power by defendant ACBL with respect to the *interstate* business of providing personnel and equipment for scoring duplicate bridge tournaments throughout the United States; the intent to use that power; the use of intimidation and coercion to effectuate a boycott by all the prospective customers of plaintiff throughout the United States. The acts complained of accordingly are of interstate character, and the perpetuation of a monopoly in a relevant market that encompasses the entire United States.

If the gravamen of the complaint were the monopolization of a local segment of commerce in Riverside and Redlands, which it is not, then the next inquiry would be whether or not those acts complained of had an appreciable effect upon interstate commerce. In *Page v. Work* and in Lieberthal the acts complained of were the monopolization of purely local segments of commerce and, accordingly, it was necessary to inquire whether or not there was any appreciable effect on interstate commerce. In *Page v. Work* the complained-of activities were the monopolization of a legal publication

business in the Los Angeles area, and in Lieberthal the acts complained of were the imposition of restraints on a particular bowling alley operation which was geographically confined.

In the case at bar the acts complained of were not geographically confined as in *Page v. Work* or in Lieberthal. Thus in defendants' own words (Op. Br. p. 13):

> "In the present case the complained-of activities are simply those set out above—the League told its units that if plaintiff's computer were to be used to score a bridge tournament conducted by the units, then the League would not award its master points to the players competing in the tournament."

Now the units are *three or four hundred in number and are located throughout the United States.* Hence, it is altogether clear by defendants' own admission that the complained-of activities were national in scope.

Apex Hosiery Is Clearly Distinguishable.

The *Apex Hosiery* case, contrary to defendants' assertion (Op. Br. p. 15), does not establish that certain non-commercial organizations are outside the scope of the Sherman Act. This is believed to be an unjustified generalization of that opinion. The defendants were simple tort feasers involved in a labor dispute who had not the remotest desire to monopolize the hosiery business. In the case at bar there is a direct purpose of defendants to monopolize the very business that plaintiff is in.

Lack of a Direct Precedent Is No Bar to Relief.

Defendants point out (Op. Br. pp. 17-18) that there is no precedent specifically holding that the prohibition of the Sherman Act extends to the scoring of bridge games played at tournaments. If specific precedents were required, which they are not (*United States v. du Pont, supra*), the Sherman Act would fast become a relic of history.

A Restraint Exists When Viewed From the Business Standpoint.

The "complained-of activities" of defendants have, contrary to the policy of the Sherman Act, eliminated from interstate commerce the business enterprise of plaintiff. District Judge Symes in *United States v. National Retail Lumber Dealers Association*, 40 Fed. Supp. 448, at page 458, quoted with approval an opinion in *Patterson v. United States,* 222 Fed. 599, cert. denied 238 U.S. 635:

> "8. To bring a conspiracy within Act July 2, 1890, §1, it is not essential that its execution be of any benefit to the conspirators; it being sufficient that it will be in restraint of another's interstate trade or commerce."

The Cartwright Act Applies.

Defendants argue that if commerce is not involved for purposes of the Sherman Act, necessarily there is no commerce involved for purposes of the Cartwright Act. But if commerce is involved for purposes of the Sherman Act, correspondingly commerce is involved for purposes of the Cartwright Act.

There may be a specific exception in California law to the effect that the practice of medicine is not commerce. This is all *Osteopathic Physicians & Surgeons v. Calif. Medical Assoc.* stands for. The business of plaintiff and defendant ACBL hardly falls within the category of the practice of medicine. Services are certainly a commodity of commerce within the meaning of the Cartwright Act, and as clearly established by *Babcock v. Crafts 20 Big Shows* (Op. Br. p. 29).

Reasonableness Is a Question of Fact for the Jury.

The court below held: "Since the very basis of the League's appeal to the membership is the Master Point plan, it seems only reasonable and logical that the League should seek to control the mechanics of scoring." This is a *finding of fact* on the very issue of reasonableness. Plaintiff insists upon its day in court to establish that the conduct in question is indeed unreasonable.[2]

If automatic pinspotting equipment accurately and efficiently performs the task of setting pins and displaying the results achieved by bowlers, it makes little difference to the National Bowling Congress whether AMF equipment or Brunswick equipment is used. Plaintiff insists that it would be unreasonable for the National Bowling Congress, which keeps records as to the achievements of bowlers, to coerce bowling leagues into using only Brunswick equipment under the threat of withholding awards.

So long as the wagering is accurately tabulated and computed, it makes very little difference to a person col-

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[2]Even in *Deesen v. P.G.A.*, 358 F. 2d 165, cited by defendants, there *was* a trial and a finding of fact that the rules of the P.G.A. were reasonable.

lecting winnings (the measure of merit) whether the equipment accomplishing that task is that of the American Totalizator Company or some other company. So long as votes are accurately tabulated and computed, the winning office seeker cares little whether the voting machines are made by Cubic Corporation, Westinghouse, General Electric or someone else. So also here it makes no difference whatsoever to the maintenance of the award system of defendant ACBL whether the tournament results are tabulated and computed by Bridge Corporation of America, Minneapolis-Honeywell, the defendant ACBL or others. The award system is only interested in *who* won, not *how* the scoring was accomplished. The assumption by the lower court that there is any legitimate relationship between its Master Point plan and the mechanics of scoring is erroneous and wholly unjustified. Plaintiff is entitled to a trial on this very issue.

There Has Been an Unlawful Interference With Prospective Economic Advantage.

Show Management v. Hearst Publishing, cited by the appellees (Op. Br. p. 25), establishes the proposition that justification for interference is an affirmative defense and, like any other affirmative defense, it must be proved unless, of course, the defense appears on the face of the Complaint. In the *Show Management* case the parties were direct competitors in the business of conducting a sportsman's type show. There was no allegation in the *Show Management* case that the defendant had ever directly contacted any of plaintiff's customers. All that defendant had ever done was to advertise its show by conventional newspaper media. The only unlawful acts complained of were those of mis-

leading advertising for which the court found no remedy in accordance with the leading "washboard" case. In the *Show Management* case the court accordingly found that the privilege involved was one of competition. In the case at bar there was direct contact and coercion of plaintiff's prospective customers.

The authorities cited by the appellant are rooted in the decision of the Supreme Court of California in *Imperial Ice Co. v. Rossier, et al.,* 18 Cal. 2d 33, 112 P. 2d 631. The Supreme Court endorsed a rule setting forth the bounds of privileged competition as follows, at page 634:

> ". . . Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, *intimidation, coercion, obstruction,* . . ." (Emphasis added.)

In the case at bar we have a clear case of intimidation and coercion, namely, the threat of withholding the granting of awards should the customer in question do business with the plaintiff Bridge Corporation of America.

In *Lawless v. Brotherhood of Painters* (Op. Br. p. 24) the defendant brotherhood was in a confidential relationship with the local in question by virtue of the fact that it was responsible, at least to some extent, for the debts of the local, and that it had a right to the assets of the local upon dissolution. This was held sufficient to create the "confidential relationship". But in the case at bar the trier of facts need only examine the rela-

tionship of the ACBL to the individual units. As shown by Exhibit B [Tr. p. 110], it is manifestly clear that the defendant ACBL has no financial interest whatsoever in the individual units. Moreover, the defendant ACBL suggests to the units the following bylaw provision to the units [Tr. p. 108]: "To acquire, hold, administer, maintain and dispose of all the property of the Unit." Accordingly, the relationship between the ACBL and the several units is that of a trade association to its members, and there is no confidential relationship between such trade association and its members. The court below recognized in its Memorandum Opinion [Tr. p. 128] that some of the units are separate corporations. If there is a "confidential relationship", let the defendants plead and prove it. This is a matter of defense.

The two other cases cited by the appellees (Op. Br. p. 25) are similarly irrelevant. In *Wise v. Southern Pacific Co.*, *employees* of the corporate defendant caused the corporate defendant to breach a contract. There is no allegation that the individual employee defendants were acting in any capacity other than that of employee and, accordingly, there was a confidential relationship. But in the case at bar the defendant ACBL is not and was not an employee or officer or director of either the Riverside or Redlands units which were caused to terminate their arrangements with the plaintiff Bridge Corporation of America.

In *Sullivan v. Warner Bros. Theatres, Inc.*, defendant simply posted signs at its establishment requesting patrons not to patronize an ice cream store in the vicinity. This was a libel case in which the issues of confidentiality or privilege were not raised. In any event,

the defendant did not use unjustified coercion, such as refusing admission to those who patronized the plaintiff.

The issue of privilege or confidential relationship is one that must be decided after consideration of all circumstances. In the *Imperial Ice Co.* case, *supra*, the Supreme Court stated, at page 632:

> ". . . Most jurisdictions also hold that an action will lie for inducing breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. [Citing cases.]
>
> "Such justification exists when a person induces a breach of contract to protect an interest which has greater social value than insuring the stability of the contract."

It is manifestly clear that the trier of facts must evaluate whether there is any social value whatsoever in the actions taken by the defendant ACBL, all in relationship to the social value of free competition and the free interplay of market forces. Plaintiff submits and proposes to prove at trial that there is no social justification whatsoever and, accordingly, no privilege.

Conclusion.

It is submitted that the court erred in deciding factual issues such as reasonableness. It is submitted that the court erred in confining the scope of the Sherman Act to classical types of commerce and contrary to *United States v. du Pont, supra.* It is submitted that the Complaint states a cause of action for which jurisdiction exists under the Sherman Act. It is submitted, moreover, that the Complaint states a full and complete

cause of action under the Sherman Act, the Cartwright Act and under the common law theory of unjustified interference with prospective economic advantage.

Respectfully submitted,

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Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

FRED FLAM